



GEORGETOWN UNIVERSITY LAW CENTER
INSTITUTE FOR PUBLIC REPRESENTATION

Hope M. Babcock
Angela J. Campbell
David C. Vladeck
Directors
James A. Bachtell+*
Michael D. Beach
Sheila A. Bedi
Lisa Goldman+**
Amy R. Wolverton
Staff Attorneys

600 New Jersey Avenue, NW, Suite 312
Washington, DC 20001-2075
Telephone: 202-662-9535
TDD: 202-662-9538
Fax: 202-662-9634

September 18, 2002

VIA Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: **In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rule Making, MM Docket No. 98-204, Dec. 21, 2001**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, this letter is to provide notice of an *ex parte* meeting with Commission staff in the above-referenced docket. On September 17th, Terry O'Neill and Linda Berg of the National Organization for Women (NOW), and Amy Wolverton and Connie Milonakis of Georgetown University Law Center's Institute for Public Representation on behalf of NOW, met with Commissioner Kevin J. Martin and Catherine Crutcher Bohigian, Legal Advisor to Commissioner Kevin J. Martin, as well as Susan Eid, Legal Advisor to Chairman Michael K. Powell.

During these meetings, representatives of NOW generally discussed the substance of their Comments filed with the Commission April 15, 2002 and their Reply Comments filed with the Commission May 29, 2002. Emphasizing the continuing need for equal employment opportunity outreach rules, they referred the Commission to prior *en banc* hearing testimony and recent studies that show women continue to be underrepresented, particularly at the management level, in the broadcast and cable industries.

NOW's representatives also urged the Commission to retain the Annual Employment Report (Form 395-B). They discussed the Commission's congressional and unique public interest obligation to retain the report, highlighting the public's need to access pertinent employment data. NOW's representatives further explained that the Commission fully

+Practice Supervised by Members of the D.C. Bar

*Application to the D.C. Bar pending **Admitted to the California Bar only

responded to the Court's concerns in *Lutheran Church* by prohibiting use of the report for purposes of evaluating broadcast entities on their individual outreach efforts.

In addition, participants discussed the disadvantages of administering the Annual Employment Report anonymously, explaining that anonymous reports: (1) are unnecessary as the Commission has assured it will not use the report to evaluate individual broadcast entities; (2) would prevent the Commission from verifying the accuracy of the employment data; and (3) would deny potential employees the opportunity to make informed decisions about where they want to work.

Finally, NOW's representatives briefly discussed the State Broadcasters Associations' proposed draft rule and referred the Commission to their earlier comments addressing the proposal's failure to accomplish the Commission's outreach goals. A copy of NOW's response to the *ex parte* filings of NAB and the State Broadcasters Association provided to Commissioner Martin, Ms. Bohigian, and Ms. Eid is attached to this letter.

Pursuant to the Commission's Rules, this *ex parte* notice is being filed electronically through the Commission's Electronic Comment Filing System procedures. Please do not hesitate to contact me at 202-662-9545 should you have any questions regarding this filing.

Sincerely,

Amy R. Wolverton

Attachment

cc: Commissioner Kevin J. Martin (FCC)
Catherine Crutcher Bohigian (FCC)
Susan Eid (FCC)
Terry O'Neill (NOW)
Linda Berg (NOW)

NOW *ET AL.* 'S RESPONSE TO *EX PARTE* FILINGS OF NAB AND STATE BROADCASTERS ASSOCIATIONS

The National Organization for Women, NOW Legal Defense and Education Fund, Feminist Majority Foundation, Philadelphia Lesbian and Gay Task Force, and the Women's Institute for Freedom of the Press ("NOW *et al.*") emphasize the continuing need for EEO rules and the retention of the Annual Employment Report (FCC Form 395-B) in response to the *ex parte* letters and further comments of the National Association of Broadcasters ("NAB") and the State Broadcasters Associations ("State Broadcasters").¹

First, NOW *et al.* call attention to recently released studies illustrating the continued under-representation of women in the broadcast and cable industries, indicating the continuing need for EEO rules. Second, NOW *et al.* address NAB's claim that the *Lutheran Church* decision somehow limits the Commission's authority to require Annual Employment Reports. Finally, NOW *et al.* direct the Commission to their earlier comments which address the State Broadcasters recently proposed draft rule.

Recent Studies Illustrate the Continuing Need for EEO Outreach Rules

Contrary to NAB's assertions,² both *en banc* hearing testimony and recent studies show that women are still underrepresented in the broadcast and cable industries. The Annenberg Public Policy Center recently released a report highlighting the sparse number of women in management positions of communications companies.³ Former FCC Commissioner Susan Ness said, "With few exceptions, we have not moved beyond tokenism in the number of women in top leadership positions or serving on the boards of communications companies."⁴ The report finds that among the presidents and chief executive officers of over 120 broadcast television and cable networks, only sixteen percent (16%) are women, and only one in five heads of local television stations and cable systems are women.⁵

Similarly, the Most Influential Women in Radio ("MIW") summary released August 7, 2002 shows that opportunities for women in radio are "still far below the management opportunities for men."⁶ According to this study, the percentage of female general managers has not increased from last year and the percentage of stations with female general sales managers has actually decreased during this past year.⁷ Beth Gerber, the President of the Southern California

¹ *Ex parte* letter from NAB to Commission, Aug. 13, 2002 ("NAB Letter"); *Ex parte* letter from State Broadcasters to Commission, August 6, 2002 ("State Broadcasters' Letter").

² See NAB *EEO Views & Proposal*, Attachment to Notice of *ex parte* Communication, Aug. 26, 2002 (relying on a "lack of evidence of discrimination or homogeneity in the record").

³ See Annenberg Public Policy Center, *The Glass Ceiling in the Executive Suite: The 2nd Annual APPC Analysis of Women Leaders in Communication Companies* at 4 (2002), available at <http://www.appcpenn.org> ("Report").

⁴ See Press Release, Annenberg Public Policy Center, Women Fail to Crack the Glass Ceiling In Communication Companies (Aug. 27, 2002) available at <http://www.appcpenn.org>; Former Commissioner Susan Ness Remarks (revealing that fewer than one in five board members of the largest communication companies are women).

⁵ See Report, *supra* note 3, at 4.

⁶ Press Release, Most Influential Women in Radio, Annual Gender Analysis Released by MIW's (Aug. 7, 2002), available at http://www.radiomiw.com/pr_cmfl/pr_020808.cfm (analyzing M Street Trend Report on the status of women managers in the radio industry).

⁷ *Id.*

Broadcasters Association, attributes this lack of progress to a deficiency in the number of outreach programs specifically for women.⁸ Thus, these recent studies, supplemented by the findings presented in *NOW et al.*'s earlier comments and *en banc* testimony confirm that underrepresentation of women in the communications industry continues to be a problem to be addressed by sound EEO rules.

The Commission has the Authority and Obligation to Maintain the Annual Employment Report

Contrary to NAB's repeated assertions, nothing in the *Lutheran Church* decision requires the Commission to abandon the Annual Employment Report. The Commission itself has repeatedly rejected NAB's argument that *Lutheran Church* prohibits collection of employment data.⁹ As explained more fully in *NOW et al.*'s previous comments,¹⁰ Section 334 of the Communications Act requires the Commission to retain the Annual Employment Report by prohibiting revisions to "forms used by such licensees and permittees to report pertinent employment data to the Commission."¹¹

Lutheran Church does not undermine the Commission's obligation to retain the Annual Employment Report. In fact, *Lutheran Church* did not address use of the Annual Employment Report solely for the purpose of industry trend analysis and assessment, and the decision does not negate the Commission's obligation to retain the report in accord with Congressional directives.¹² *Lutheran Church* was concerned not with the report itself, but rather with the use of the report for purposes of evaluating broadcast entities on their efforts to recruit and hire women and minorities.¹³ The Commission has fully responded to the court's concern by prohibiting the use of this data in assessing compliance by any station or entity. In its *Report and Order* issued after the decision, the Commission specified that the Annual Employment Report was to be used for purposes of monitoring industry trends, assessing the overall effectiveness of the rule, and reporting to Congress, but not for assessing an individual licensee's compliance with the EEO requirements.¹⁴ The Commission specifically stated that it would only "use the data only in aggregated form for trend reports and to report to Congress" because it has a "continuing

⁸ *Id.*

⁹ *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order*, MM Dkt. No. 98-204, 15 FCC Rcd 2329, 2394-2400 ¶¶ 63-64, 163-178 (2000) ("*Report and Order*"); *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Partial Reconsideration and Clarification*, 15 FCC Rcd 22559 ¶ 37-39 (2000) ("*Recon*").

¹⁰ See Comments of *NOW et al.*, MM Dkt. No. 98-204, filed April 15, 2002, at 27-30 ("*NOW et al.*'s Comments").

¹¹ 47 U.S.C. § 334 (2002); H.R. CONF. REP. NO. 102-862, at 97 (1992), reprinted in 1992 U.S.C.C.A.N. 1231, 1279. The Conference Report states that Section 334 incorporates the Annual Employment Report (Form 395) into the Communications Act. The report also provides that the form is to be filed "in the same manner, with the same format and content and same terms and conditions as in effect [in 1992]." Because Section 334 prohibits revision of "forms used by licensees and permittees to report pertinent employment data to the Commission" that were in effect on September 1, 1992, the Commission is obligated to supply the data on an annual basis.

¹² *Report and Order*, 15 FCC Rcd at 2394-95 ¶ 164 (citing H.R. Rep. 628, 102 Cong., 111, 112 (1992) and noting that "Congress clearly contemplated continued Commission monitoring of employment trends"); *Recon*, 15 FCC at 22558-59 ¶ 35-37; see also Note to 47 C.F.R. § 73.3612 (2002).

¹³ See *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998).

¹⁴ *Report and Order*, 15 FCC Rcd at 2358 ¶ 64; *Recon*, 15 FCC Rcd at 22558-59 ¶ 35.

responsibility to assess whether [its] policies are working."¹⁵ In fact, the Commission assured that it would “summarily dismiss pleadings alleging EEO violations” based on data from the report.¹⁶ Thus, despite NAB’s contentions, the Commission has not ignored the court’s ruling in *Lutheran Church*; it has directly responded with constitutionally permissible, tailored rules and policies.

The Annual Employment Report May be Severed from the EEO Outreach Rules

Because the Commission has revised its rules in accord with *Lutheran Church*, no further analysis regarding the severability of Section 334’s mandate for the EEO rules from the mandate for Annual Employment Reports is necessary as NAB suggests.¹⁷ Nevertheless, both the *Chadha* and *Denver* tests proposed by NAB for determining severability support *NOW et al*’s position that the report can and should be maintained.¹⁸

In *Chadha*, the Supreme Court declared that one statutory provision may be severed from another if “what remains after severance ‘is fully operative as law.’”¹⁹ Because the Annual Employment Report is intended for the purpose of collecting employment data for industry trend analysis rather than for the purpose of evaluating the outreach efforts of individual entities, it can survive as a fully operative and workable mechanism apart from the EEO outreach rules themselves.

Further, the Annual Employment Report may be maintained irrespective of the EEO outreach provisions because it serves congressional intent to foster equal employment opportunity on its own. The Court in *Denver Area Telecommunications Consortium* held that if Congress would have passed one provision even knowing that the others would be invalidated, then that provision may be separately maintained.²⁰ In *Denver*, the Court held that because one of the challenged provisions of the Cable Television Consumer Protection and Competition Act of 1992 concerned programming of leased access channels while another concerned programming of public, educational, and governmental channels, one could be severed without undermining the other or the overall objective of protecting children.²¹ Similarly, because the Annual Employment Report concerns the analysis of industry employment trends, while the EEO rules concern promotion of entity outreach, severing the two provisions would not

¹⁵ *Report and Order*, 15 FCC Rcd at 2395 ¶ 164-65.

¹⁶ *Recon*, 15 FCC Rcd at 22559 ¶ 35, 39-40 (explaining that the Commission will “not use the employment data as a means for processing or screening renewal applications or mid-term reviews” or “as a basis for conducting audits or inquiries”); *Report and Order*, 15 FCC Rcd at 2417-18 ¶ 225-26.

¹⁷ *See NAB Letter*.

¹⁸ *See id.* (citing *INS v. Chadha*, 462 U.S. 919 (1983) (“*Chadha*”) and *Denver Area Education Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (“*Denver*”)).

¹⁹ *Chadha*, 462 U.S. at 935 (quoting *Champlin Refining Co. v. Corporation Comm’n*, 286 U.S. 210, 234 (1932) finding that the administrative process enacted by Congress authorizing the Attorney General to suspend an alien’s deportation as entirely independent from the rejected one-house veto).

²⁰ *Denver*, 518 U.S. at 767 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 506 (1985)).

²¹ *Id.* at 767 (explaining that one provision has little if any effect on the other and thus, the absence of one, could not make a significant difference).

undermine Congress' basic objective in implementing either provision or its overall objective of achieving effective equal employment opportunity in the broadcasting and cable industries.²²

Moreover, despite NAB's assertions, the Commission's suspension of the Annual Employment Report did not undermine or recant its authority to retain the report. Commenting on the suspension, Chairman William E. Kennard said, "I anticipate that the Commission will want to continue to collect industry trend data to monitor the participation of women and minorities in broadcasting, something we unquestionably have the authority to do."²³ The Commission reasoned that suspension was advisable while it considered adoption of new EEO rules that properly addressed the court's concerns and made any appropriate revisions to its data collection procedures.²⁴ Chairman Kennard clarified that the suspension would be used an opportunity for the Commission to focus on promptly developing revised rules responsive to the concerns of the court while at the same time ensuring that the rules' critical public interest goals were achieved.²⁵

The opportunity for focused reflection to permit expeditious revision to the rules did not undermine the Commission's authority or obligation to collect data. In fact, the D.C. Circuit did not question Commission's authority impose such reporting requirements even after this temporary suspension of the rules when it rejected a claim by broadcasters that the requirements create an arbitrary and capricious regulatory burden.²⁶ Accordingly, the Annual Employment Report could be maintained even without the Commission's EEO outreach rules.

The State Broadcaster's Proposed Draft Rule Fails to Further the Commission's Outreach Goals

Not only are the EEO rules and the Annual Employment Report still necessary and legally justified in accord with *Lutheran Church*, they are essential to achieve the Commission's goal of broad outreach. The State Broadcasters' August 2002 *ex parte* filing of a proposed draft rule merely encapsulates the State Broadcasters' previously filed comments into specific requirements that would fail to further this broad outreach goal and would actually perpetuate the very insular hiring practices the Commission seeks to guard against. Specifically, their proposal potentially excludes half of the industry vacancies, relies too heavily on the Internet, eliminates public access to broadcast and cable entity information, and provides exemptions that essentially thwart the entire purpose of the rules. In response, NOW *et al.* respectfully refer the Commission to its previously filed reply comments²⁷ which address these and other concerns with NAB and the State Broadcasters' proposals.

²² See *Report and Order*, 15 FCC Rcd at 2336-37 ¶ 21. Compare 47 U.S.C. § 334(a)(1) with 47 U.S.C. § 334(a)(2) (referring to 47 C.F.R. § 73.2080 and 47 C.F.R. § 73.3612, respectively).

²³ *Suspension of Requirement for Filing of Broadcast Station Annual Employment Reports and Program Reports*, 13 FCC Rcd 21998 (1998), Statement of Chairman William E. Kennard.

²⁴ *Id.*, Memorandum Opinion & Order text.

²⁵ *Id.*, Statement of Chairman William E. Kennard.

²⁶ *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 17-18 (D.C. Cir. 2001) ("Association"); see *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, Second Notice of Proposed Rulemaking*, 16 FCC Rcd 22843, 22858 ¶ 51 ("The Court did uphold all of the reporting requirements adopted by the Commission in the *Report and Order*, including the requirement for filing FCC Form 395-B.").

²⁷ *Reply Comments of NOW et al.*, MM Dkt. No. 98-204, filed May 29, 2002, at 12-27.

In sum, NAB and the State Broadcasters' *ex parte* filings fail to advance any convincing arguments for elimination or reduction in the EEO rules. Recent studies emphasize the continuing need for EEO outreach rules, and the Annual Employment Report is essential for collection of congressionally mandated industry trend data. Moreover, NOW *et al.*'s earlier comments address the State Broadcasters' proposed draft rule, which would certainly fail to meet the Commission's outreach goals.